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No. 84-1328

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KAREN FRANCES ULANE,

Petitioner,

v.

EASTERN AIR LINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries and affiliates of Eastern Air Lines, Inc. are:

Eastern Air Lines, S.A.
Eastern Air Lines Trading Company
EAL Properties, Inc.
Air Line Reporting Corporation
Aeronautical Radio, Inc.
Air Cargo, Inc.
Air Cargo Facilities, Inc.
Air Lines Clearing House, Inc.
Air Line Tarriff Publishers, Inc.
Arizona Fuel Facilities
Atlanta Air Terminal, Inc.
Bradley Facilities, Inc.
CATO Detroit, Michigan
CATO Evanston, Illinois
CATO Washington, D.C.
CATO White Plains, New York
Inter-American Flight Services Company
International Aeradio (Caribbean), Ltd.
Manhattan Air Terminal, Inc.
Portland Fuel Facilities
Societe Int'l de Telcom.
Tinicum Fuel Facilities Corp.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Eastern Air Lines, Inc. respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the Seventh Circuit Court of Appeals.

Petitioner's statement of the case contains matters of questionable relevance to the petition. However, for the purpose of completeness and accuracy, the following additional statement is provided.

STATEMENT OF THE CASE

A. Summary

Petitioner was and is a biological male. Petitioner was employed to pilot Eastern's Boeing 727 aircraft for which he was responsible for the safe transportation of approximately 6,000 passengers each month. In mid-1979, Petitioner took a medical leave of absence in preparation for a surgical procedure to treat his psychiatric disorder classified

by the American Psychiatric Association as Trannssexualism. Many if not most practitioners consider such surgery to be experimental at best. That surgery was performed in 1980. In 1981, Petitioner requested return to flight status. After learning of Petitioner's medical background, Eastern denied that request. Instead, Eastern offered to find Petitioner continued employment with the Company in a ground position. Alternatively, Petitioner was offered medical disability retirement which included payments of $25,200 per year until at least age 60, additional retirement payments thereafter, medical, life insurance and other benefits. Both offers were refused by Petitioner and termination from employment followed. Eastern continues to employ another surgically treated transexual in a ground position where consideration of air safety do not arise.

At trial, Eastern presented extensive medical evidence concerning the psychiatric disorder of transsexualism in general, the effect of such disorder on Petitioner individually as well as the adverse effect of all of the foregoing on safety in commercial aviation. These medical and safety issues were rejected by trial court but were presented by Eastern to the Court of Appeals. At page 4 of the Petition for Certiorari, Petitioner's counsel incorrectly states the following:

> "The Court of Appeals decision makes clear that there are no medical or safety issues in this case. The Court of Appeals let stand the District Court's finding that Eastern's safety and medical concerns were completely without basis and pretextual."

In fact, the Court of Appeals did precisely the opposite of what counsel for Petitioner now contends. Because the Court of Appeals dealt with specific issues of law, it did not reach any of the additional medical or safety issues presented by Eastern. This is made clear at footnote 8 of the opinion by the Court of Appeals where it states: "Eastern presented a substantial amount of testimony and evidence at trial to prove that Ulane's discharge was not due to discrimination against her either as a trannssexual or as

a female, but we need not reach that issue." (A-4) At footnote 13 of its opinion, the Court of Appeals states the following: "Because of our holding in Section A, however, we need not and do not decide whether Eastern did actually discriminate against Ulane because of her transsexuality." (A-12)

Petitioner's suggestion that the Court of Appeals rejected Eastern's medical and safety concerns as without basis or that Eastern simply banished this pilot to the ranks of the unemployed without first attempting to reach a reasonable accommodation is inaccurate and unnecessary at this level of appellate advocacy.

B. Petitioner's Professional Background

During the entire time that Petitioner was flying as a pilot for Eastern, he was required to disclose to the Federal Aviation Administration on an annual basis a full medical history including current use of medication as well as all medical treatment received within the last five years. During the entire time that this pilot was flying for Eastern, he never disclosed any of the following facts either to the FAA or to his employer, Eastern, and in fact falsified several reports calling for the disclosure of this information. This conduct formed an additional basis for Petitioner's discharge from employment but was also an issue not reached by the Court of Appeals:

Petitioner first sought psychiatric treatment in the military in 1968 and did not disclose that fact to Eastern when he was employed as a pilot the following year. In 1970, he unsuccessfully applied for surgical treatment of his psychiatric disorder. At that time, psychological testing showed he was suffering from chronic depression with occasional suicidal thoughts. For approximately the next two years, he was under constant psychiatric care on a weekly basis. During this period of time, he also began taking the drug referred to as Estrodiol. He was simply given a large bottle containing approximately 1,000 of those pills which he took to counteract his urge to "cross-dress" as a female. After

exhausting this supply of drugs, he began treatment with another doctor in the Chicago area at which time he was unable to function unless he was either on Estrogens or wearing female clothes. The average recommended dose of Estrogens is .625 mgs. per day. When Petitioner began treatment with the new doctor, he was prescribed 1.25 mgs. Several months later, the daily intake was increased to 3.75 mgs., at which time the doctor discussed with Petitioner his concerns over such a high level of dosage. During this period of time, Petitioner was undergoing certain physical changes as a result of the Estrogens, which included the development of large breasts. His doctor recommended a mastectomy so that the Estrogen therapy would not be discovered during Petitioner's annual FAA physical examinations. By January, 1978, Petitioner had increased the daily dosage of Estrogens to 10 mgs. per day and was "feeling so badly" that the Estrogens were being administered both orally and by injection. On at least one occasion, Petitioner had to be rushed for emergency medical treatment as a result of a reaction to the drug therapy. Throughout this period of time, Petitioner had seriously contemplated suicide on many occasions.

Estrogen doses in the amount of 5 mgs. per day or more increase the risk of heart attack, pulmonary embolism, increased mental depression, stroke, and gradual or sudden loss of vision. While on such dosages of Estrogens, patients are to be considered at "clear risk" for any and all of the foregoing.

Petitioner correctly points out that he never had an "accident" while flying Eastern aircraft. However, if Petitioner ever experienced an emergency situation while flying Eastern aircraft as now contended in the Petition, such was never reported either to Eastern or the FAA, which would have been in further violation of federal regulations, company policy and basic pilot responsibility.

C. Transsexualism

Petitioner's explanation of the psychiatric disorder of transsexualism is incomplete. A review of the medical authorities cited in the decision of the Court of Appeals and as developed at a trial of this action show that the essential features of the disorder go well beyond a simple sense of discomfort as Petitioner contends. Frequently, the social and occupational functioning of the patient are markedly impaired, depression is common and it can lead to suicide attempts. Without treatment, the course of the disorder is chronic and unremitting. Since surgical treatment is still in an experimental stage, the long-term course of the psychiatric disorder with this treatment is unknown to the medical profession. The disorder is rare. Both the cause and the cure for transsexualism is unknown. Surgical treatment is not designed to cure transsexualism. At most, it is designed to give the patient some subjective relief. Even after the surgery, the person still has the psychiatric disorder. Transsexuals suffer from moderate to severe personality disturbances and, frequently, from considerable anxiety and depression. Prior to surgery, the transsexual patient is frequently suicidal and may engage in self-mutilation. The transsexual candidate is highly intelligent, very verbal and given to much fantasy. Their speech is filled with resentful comments about medicine and law and in spite of their docility, they take considerable risks. Deep depression is an "imminent danger" among both pre and post-surgical transsexuals.

The long-term medical study of post-surgical transsexuals is difficult because few patients return for follow-up studies and few such studies have been conducted. The studies that have been conducted on this subject have identified varying degrees of a return to pre-existing depressive state leading up to and including suicide.

Medical science has not advanced to the point where it can predict wth any degree of reasonable certainty whether a surgically-treated transsexual will later regret the decision and suffer psychologically debilitating results in the future.

Whether surgery should be used as a treatment of transsexuals and, if so, which patients are best suited for the surgery is an unresolved medical question and continues to be a highly controversial issue, subject to extensive debate within the medical community[1]

D. The FAA Certification Process.

After Petitioner ceased flying for Eastern in 1979, his medical certificate issued by the F.A.A. expired by its own terms. In June, 1980, Petitioner reapplied for a new certificate. At that time, the F.A.A. Medical Examiner refused to issue such a certificate on the basis that Petitioner was unfit for flight duties. Several months later, the F.A.A. reconsidered that determination and eventually issued Petitioner a medical certificate valid for approximately 90 days and subject to repeated psychiatric examinations "with emphasis on your emotional adjustment as it relates to your flying activities." Whether the certificate would ever be renewed was subject to the following: "If during the surveillance period there have been no adverse findings, a determination will be made regarding the need for continued surveillance of your mental health status."

Prior to this case, neither the F.A.A. nor any commercial air carrier had ever had experience with pilots with the diagnosed psychiatric disorder of transsexualism.[2]

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[1] Additionally, the ability to distinguish between transvestites & transsexuals is extremely difficult. On March 1976 Petitioners Psychiatrist stated "I do not see this man as transsexual in any way. He seems to be a transvestite . . ." He just changed that diagnosis to Transsexualism in February 1980, just two months before surgery was performed.

[2] Arguably, Eastern did have the experience of Pilot Ulane's service with the company. That service was hallmarked by a repeated failure to disclose obviously serious psychiatric problems and to place at risk every flight to which he had been assigned. His failure to disclose past medical problems including falsification of records to cover-up the same makes it virtually impossible for any air carrier to rely on this individual to disclose any future problems, whether relating to his psychiatric disorder or even a totally unrelated medical problem. Trustworthiness and reliability are attributes of a commercial pilot at least as important as the ability to mechanically manipulate the controls of an aircraft.

SUMMARY OF ARGUMENT

A. Transsexuals Are Not Protected Under Title VII of the Civil Rights Act of 1964.

This holding by the Court of Appeals was correctly based on its review of the legislative history leading to the enactment of Title VII, the numerous unsuccessful legislative attempts to expand the narrow definition of "sex" as contained in that statute as well as 20 years of judicial authority including identical holdings by the Eighth and Ninth Circuits.

Petitioner appears to now have conceded the correctness of this holding but seeks to avoid its affect by arguing that those transsexuals which can financially afford cosmetic surgery to treat the symptoms of the disorder can acquire a new and different sex within the meaning of the statute. That argument runs contrary to this Court's repeated admonition that statutes should be interpreted to avoid untenable distinctions and unreasonable results. *American Tobacco Co. v. Patterson*, 456 U.S. 63 at 71 (1982).

B. One Cannot "Change Sex" for Purposes of Title VII.

The Seventh Circuit, as well as the Eighth and Ninth Circuits, correctly concluded that the term "sex" as used in Title VII is to be given its plain and traditional meaning of *biological* sex, i.e., that immutable characteristic with which each is endowed at birth. Congress has repeatedly rejected attempts to expand the definition of the word "sex" in Title VII. Therefore, Petitioner's position is an invitation for this Court to enter into a legislative function. Petitioner's argument for the expansion of the scope of Title VII should be addressed to the Congress where the social, economic and

even religious aspects of the issue may be more fully debated and considered.

Furthermore, the suggestion that the definition of the word "sex" in Title VII should be given a more subjective judicial interpretation which would include the ability to change biological sex creates a burden on all employers subject to the act which is both unjust and unworkable as part of a national labor policy. Such a subjective approach would logically extend to national origin and even race. If a change in these traditional notions of immutable characteristics is to be thrust upon employers, it should be done only after the use of the legislative process, which to date the Congress has refused to do.

Finally, a male transsexual retains the male sex for purposes of Title VII and can state a cause of action for discrimination against a male but not against a female. Sex, for purposes of Title VII, is immutable. To hold otherwise would be to provide to transsexuals super status under Title VII. They could claim coverage as both male and female, a result not enjoyed by non-transsexuals and certainly not intended by the Congress.

C. The Court Below Did Not Violate Its Appellate Authority.

Even if a biological male could "become a female" for Title VII purposes, the Court of Appeals correctly concluded that there was no evidence to support a finding of discrimination on that basis even if such a finding had been made by the trial court. There is nothing in the Court of Appeals decision that would even suggest that it reversed a specific finding of fact on less than a clearly erroneous standard. Sufficiency of evidence, or lack thereof, is a question of law properly within the jurisdiction of any appellate court. The Court of Appeals did not consider the weight of the evidence which was the error committed by the Fifth Circuit in the *Pullman-Standard* case.

ARGUMENT

I. TRANSSEXUALS, INCLUDING THOSE WHO ATTEMPT TO "CHANGE SEX," ARE NOT PROTECTED BY TITLE VII.

A. Courts Have Narrowly Defined the Term "Sex"

Petitioner contends that the word "sex" as it appears in Title VII should be given an expansive interpretation beyond the traditional concept of biological sex. Petitioner urges the Court to accept what some commentators and the trial court below have characterized as "psychological sex," i.e., our sex is determined by how we perceive ourselves as weli as how we are perceived by others. This Court has not addressed the meaning of the word "sex" as it appears in Title VII. However, in the case *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, (1973) this Court observed the following in a case alleging discrimination against service women in violation of the due process clause of the Fifth Amendment:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . 411 U.S. at 686, 93 S. Ct. at 1770.

That same traditional interpretation of the word "sex" has been adopted by every Court that has considered the meaning of the word wthin the Title VII context. The Fifth Circuit Court of Appeal summarized the uniformly accepted approach to the proper interpretation of the Congressional intent behind Title VII in *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) as follows:

> Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either

> beyond the victim's power to alter . . . or that impose a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics.

This same limited definition of sex as the "immutable personal characteristic which one acquires at birth" will be found in the following Title VII cases dealing with issues other than transsexualisms: *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) *cert. denied* 422 U.S. 1046 (1975); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2nd Cir. 1976); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973).

With these authorities as background, every Court that has considered the issue has refused to extend Title VII protection to transsexuals including those who have attempted to voluntarily alter their original "immutable" sex with which they were endowed at birth. The Ninth Circuit Court of Appeals addressed the issue in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). In rejecting the argument which Petitioner now makes to this Court, the Ninth Circuit observed the following:

> Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congresssional mandate . . . A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This Court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate. 566 F.2d at 663-64.

The Eighth Circuit Court of Appeals rejected Petitioner's argument for a "psychological sex" approach to Title VII in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982). In rejecting the claim of a biological male who claimed employment discrimination based on a newly-acquired female sex, the Eighth Circuit stated the following:

> Although this Circuit has not previously considered the issue raised on this appeal, we are in agreement with the district court that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. 667 F.2d at 750.

The Third Circuit Court of Appeals' approach to this issue is represented in *Grossman v. Bernards Township Board of Education*, 11 EPD ¶10, 686 (D.C.N.J. 1975) *affd.* 538 F.2d 319 (3rd Cir. 1976). In that case a biological male transsexual school teacher had been discharged by the local school board after undergoing a "sex reassignment operation." Plaintiff alleged that the operation had changed his sex to that of a female for Title VII purposes, and that "she" had been unlawfully discriminated against because of her newly acquired female sex. The Third Circuit affirmed the trial court's dismissal of the Complaint on the basis that it failed to state a claim of unlawful job discrimination based on "sex" under Title VII.

The numerous Federal District Court decisions which have reached the same result are cited at length in the Seventh Circuit's decision in this case and will not be repeated here.

B. Legislative History and Subsequent Attempts to Amend Title VII.

The legislative history concerning the inclusion of the word "sex" in Title VII has also been reviewed at length in the decision of te Court of Appeals in this case. Like all other Courts before it, the Seventh Circuit has correctly declined the invitation to expand the definition of sex discrimination within the context of Title VII in the absence of further action from the Congress. The reasoning for de-

clining to do so is summarized by the Fifth Circuit Court of Appeals in *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc) where the following was stated:

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

Not only has Congress refused to give such a mandate, it has specifically declined numerous attempts to expand the definition of sex discrimination beyond its traditional meaning.

The Seventh Circuit in this case reviewed literally dozens of attempts to amend Title VII to expand the definition of "sex discrimination" to cover such concepts as affectional or sexual orientation. The phrase "sexual orientation," if it had successfully been added to Title VII, would at least arguably have been broad enough to cover transsexuals as well as the "psychological sex" approach which Petitioner now urges to this Court. Congress has repeatedly and consistently refused to so extend the statutory protection of Title VII with full knowledge of the judicial approach set forth above.

Certainly, with this background the Seventh Circuit Court of Appeals correctly concluded that to accept Petitioner's position in this case would go beyond the realm of statutory interpretation and into the realm of legislating.

C. The E.E.O.C. Has Consistently Rejected Petitioner's Position.

All of Petitioner's "sex discrimination" claims were presented to and rejected by the Equal Employment Opportunity Commission as beyond its jurisdiction. Furthermore, the E.E.O.C. has also accepted the position that "when Congress used the word 'sex' in Title VII, it was referring to a person's gender, an immutable characteristic with which a person is born." EEOC Decision No. 76-75, CCH EEOC Decisions (1983) ¶6495 (1976).

Thus the Commission has taken the position that Title VII does not extend coverage to transsexuals or to those who allege discrimination for having undergone a "sex change operation." EEOC Decision No. 76-67, CCH EEOC Decisions (1983) ¶6493 (1976); EEOC Decision No. 75-030, CCH EEOC Decisions (1983) ¶6499 (1975).

While the Commission's interpretation of the application of Title VII is certainly not binding upon this Court, it is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

II. PETITIONER CANNOT "BECOME A WOMAN" FOR TITLE VII PURPOSES — A PRACTICAL APPROACH.

As this Court has recently observed in *American Tobacco Co. v. Patterson*, 456 U.S. 63 at 71 (1982), statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible. The Court of Appeals decision is consistent with this observation. Petitioner's contention that a biological male can change sex for purposes of Title VII is not.

The subjective definition of sex which Petitioner urges to this Court has no place in a statute which forms an integral part of this country's national labor policy. If such policy should embody the concept that an employee can "change sex," how is an employer or indeed the Courts or the Commission expected to know at what point this change of sex has actually taken place. When does a biological male employee become a female employee for Title VII purposes? Certainly it could not be solely at the point that surgical castration takes place. If such an individual continues to dress, act, speak and otherwise present himself in a male role, the employer could never determine, either for its af-

firmative action program or otherwise, whether it is dealing with a male or female.

Similarly, if this Court should judicially determine that sex actually changes at the time of surgical castration under the form of a "sex reassignment" operation, does that not itself create an additional form of economic discrimination? The surgery which Petitioner refers to is expensive. The testimony in this record is that the plastic surgeon alone charges as much as $10,000 in addition to the charges by the hospital and psychiatrists. Certainly it would be inequitable to define sex on the basis of the economic ability to pay.

The illogical extension of Petitioner's position does not end here. If one can change sex, either through cosmetic surgery or otherwise, then the same can also be said of national origin and indeed even race. These otherwise immutable characteristics can certainly be changed through cosmetic surgery, chemistry, dress, appearance and lifestyle to the same extent as can sex. If Petitioner can "become a woman" for Title VII purposes, an individual could also use the same techniques to become an American Indian, a Mexican-American, an Oriental and presumably even a Black American. Such ability to change would be limited only by the ability of medical science to affect these changes through cosmetic surgery or otherwise.

Finally, after two decades, it is clear that Title VII protection for women and minorities was and is premised on a basic concept of fairness. Since sex, race and national origin are involuntarily acquired solely by reason of birth, such qualities should have no adverse impact on employment. Once the involuntary nature of these qualities is removed, there would no longer be reason for statutory protection. The decision to allow employees to choose a particular sex, race or national origin is more properly within the legislative realm where all social, economic, medical and even religious aspects can be more fully debated and considered.

It is respectfully submitted that Petitioner's position is untenable and that the Circuit Court correctly concluded

that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, that new definition must come from the Congress.

III. THE COURT OF APPEALS DID NOT REVERSE A DISTRICT COURT'S FINDING OF FACT ON LESS THAN THE CLEARLY ERRONEOUS STANDARD.

The Circuit Court concluded that *even if* a biological male could "become a female," there was no evidence to support a finding of such discrimination in this case. Since Title VII does not cover such a change of sex, Petitioner's challenge to that aspect of the Court's decision is moot. However, it will be responded to briefly.

This Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), to which Petitioner refers was obviously directed at a practice that had developed in the Fifth Circuit Court of Appeals in distinguishing between "subsidiary facts" which could be reversed only if clearly erroneous and "ultimate facts" which the Fifth Circuit had come to conclude could be reversed on appeal even if they were pure issues of fact which were not clearly erroneous. Nowhere in the decision of the court below is there the slightest suggestion that the "subsidiary fact" vs. the "ultimate fact" dichotomy addressed in *Pullman-Standard* was utilized in any respect whatsoever in reversing Plaintiff's claim of discrimination against a female. Most important, there is not the slightest suggestion that the Court below reversed any finding of fact by the trial court on anything other than a clearly erroneous standard.

What the court below did do is to identify the *failure* of the trial court to make specific findings of fact capable of supporting a finding of discrimination against a female as opposed to discrimination against a transsexual. After identifying that void in the trial court's findings, the appellate court reviewed the entire record before it and concluded that "it is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female,

but because Ulane is a transsexual." To have remanded the case to the lower court for entry of findings of fact for which there was no evidence in the record and then to subsequently review such findings on appeal and reverse them as clearly erroneous would have been the ultimate useless act. The procedure followed by the appellate court below is that which has historically been followed and repeatedly sanctioned by every federal appellate court in the system. It is elementary that where a record before the appellate court is susceptible of only one reasonable interpretation, remand is totally inappropriate. In such cases, "effective judicial administration" requires that the Court of Appeals draw the inescapable factual conclusion itself rather than remand the case to the district court for further needless proceedings. *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Bigelow v. Virginia*, 421 U.S. 809, 826-827 (1975); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 62 at 170 (1967).

Ironically, the manner in which the Seventh Circuit treated Petitioner's contention that she was discriminated against because she was a female was the same treatment which the trial judge originally adopted at the conclusion of his oral findings delivered on December 28, 1983 and which appeared at C-34 of Petitioner's Appendix. At the conclusion of the trial court's orally-delivered findings of fact and conclusions of law, he had concluded that Petitioner was discriminated against as a transsexual. At no time during those findings did the trial court ever conclude that Petitioner was either a female or had been discriminated against on that basis. He specifically concluded his findings with the following observation:

> I'm going to enter judgment for the plaintiff and the question is on what counts and against what defendants. Count I alleges that plaintiff was discharged because she is a woman. Court II alleges she was discharged because she is a transsexual.
>
> I feel more confortable with Count II. *I believe that these are truly alternative theories and that it cannot be both ways. It has got to be one or the other.* The evidence much more clearly establishes in my opinion that transsexuals are entitled to protection under the Act than it does that an operated transsexual is now a woman. (Emphasis supplied).

This reasoning used by the trial judge is essentially the reasoning applied by the court of appeals on Petitioner's claim of discrimination against "a female." Even if Petitioner could legally "become a woman" for Title VII purposes (an issue of law which has been addressed above), such a claim could not be supported by the evidence in view of the conclusion that discrimination was based on the status of a transsexual rather than a female.

The only relevant procedural event that occurred after the Court's findings in December, 1983, was that in March, 1984, the court entered supplemental findings at the invitation of Petitioner. Obviously no new evidence was taken as the record was closed in December. Of significance is the fact that those "supplemental findings" were limited to the conclusion that "all of the evidence which supports the view that plaintiff is a transsexual will also support the findings that she is a female." However, the trial judge made no specific findings that Ulane had actually been *discriminated against* on the basis of being female. This lack of necessary findings on that issue was identified by the Court of Appeals. Petitioner does not argue with that portion of the Court's opinion. What Petitioner does argue with is the fact that the Court of Appeals reviewed the entire record and concluded that even if such a finding of discrimination against a female had been made, there was no evidence to support it. In the words of the Court: "It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she was female . . . ."

Respectfully, if a fact is "clear from the evidence," then a contrary fact would be "clearly erroneous." Petitioner is merely engaging in semantics in support of this aspect of the Petition and the argument is without substance.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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